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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1045

ALBERT A. GOLDFARB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On May 9, 1963, petitioner, an attorney, was found in civil contempt by Judge Kaess in the United States District Court for the Eastern District of Michigan (R. 33a-34a)[1] for refusing—on the ground of the attorney-client privilege—to answer certain

[1] The designation "R." refers to the Appellant's Appendix filed in the court below, and the designation "Tr.", to the typewritten transcript of proceedings before the grand jury, both of which have been certified to this Court.

questions put to him before a grand jury. Petitioner was committed to the custody of the United States Marshal until he answered the questions, but the effect of the order was stayed pending disposition of petitioner's appeal. (Pet. App. 15, 23.) Since the grand jury was empanelled in March 1963, its term will expire in September 1964. Federal Rules of Criminal Procedure, Rule 6(g). The contempt order will, therefore, become moot unless enforced prior to that time.

The grand jury was investigating possible income tax evasion charges against Charles Sherman, who was reported to have sold some real estate to Walter Pilat. (R. 2a-3a, 5a-6a.) One Lawrence Burns had been attorney for Sherman. Petitioner, who represented Pilat, invoked the attorney-client privilege in refusing to answer the following questions (R. 3a, 19a, 20a-21a, 23a, 27a):

> Did you have occasion to discuss the matter of the purchase of the house with one Lawrence Burns during 1961?
>
> To your knowledge did Mr. Lawrence Burns represent as attorney or otherwise Mr. Charles Sherman with respect to the sale or disposition of the house at 11310 Myers Road, in connection with any conversation that you may have had or dealings you may have had with Mr. Lawrence Burns, on behalf of Mr. Walter Pilat?
>
> Did you have occasion to have a conversation with one Lawrence Burns during 1961, or at any other time in which the subject of the house at 11310 Myers Road was discussed?

> Have you at any time had discussions with, or negotiations with, Mr. Charles Sherman, or his wife, or attorneys, or agents on their behalf in connection with the sale or disposal of the house located at 11310 Myers Road by them?

The contention (Pet. 5-9) that petitioner was entitled to refuse to answer these questions on the ground of the attorney-client privilege is plainly frivolous. The rule is that "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *Prichard* v. *United States*, 181 F. 2d 326, 328-329 (C.A. 6th), affirmed, 339 U.S. 974; VIII Wigmore, *Evidence* (3d ed.), Sec. 2292. The questions at issue here do not relate to any communication from Pilat to petitioner, let alone a confidential one. "There is no magic in a law license that would prevent a lawyer from being required to testify to acts of this kind, just as the same type of testimony might be required of a banker or of a real estate broker." *Pollock* v. *United States*, 202 F. 2d 281, 286 (C.A. 5th), certiorari denied, 345 U.S. 993; *McFee* v. *United States*, 206 F. 2d 872, 876 (C.A. 9th), certiorari denied, 347 U.S. 927; *United States* v. *DeVasto*, 52 F. 2d 26, 30 (C.A. 2d).

Equally without merit is the argument (Pet. 9-13) relating to Pilat's privilege against self-incrimination. The privilege was never invoked.[1]

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Solicitor General.

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Assistant Attorney General.

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MAY, 1964.

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[1] The phrase apparently relied upon for the argument that the privilege against self-incrimination was invoked was that petitioner's answers might be used "to the detriment of his client" (Pet. 2; R. 13a), but, when read in context (Tr. 26-27), it is clear that petitioner was merely arguing that to answer certain questions might operate as a waiver of the attorney-client privilege by opening the door to other questions.

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